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20 Massachusetts Avenue NW, Mailstop #2140
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**RE: DHS Docket No. USCIS – 20190011, RIN 1615–AC27
Asylum Application, Interview, and Employment Authorization for Applicants.**

Dear Chief Deshommes

The Catholic Legal Immigration Network, Inc. (CLINIC)¹ submits these comments in response to the Department of Homeland Security’s (DHS) Notice of Proposed Rulemaking (NPRM) entitled “Asylum Application, Interview, and Employment Authorization for Applicants,” published November 14, 2019.

There is no reason to implement a rule change that would increase economic hardships for asylum seekers and their families, the employers they work for, and the communities in which they live. Therefore, DHS should withdraw the NPRM “Asylum Application, Interview, and Employment Authorization for Applicants.”

CLINIC embraces the core Gospel value of welcoming the stranger. CLINIC promotes the dignity and protects the rights of immigrants in partnership with a dedicated network of Catholic and community legal immigration programs. CLINIC is the largest nationwide network of nonprofit immigration programs, with approximately 375 affiliates in 49 states and the District of Columbia. Through its affiliates, CLINIC advocates for the just and humane treatment of asylum seekers through direct representation, pro bono referrals, and engagement with policy makers.

CLINIC appreciates the opportunity to provide comments on this proposed rule. CLINIC believes that U.S. policies on immigration should reflect the country’s core moral values and historical practice of welcoming immigrants and refugees fleeing persecution. Immigration policies should ensure justice, offer protection, and treat immigrants humanely. People of faith have consistently

¹ These comments were primarily drafted by Reena Arya, senior attorney, Training and Legal Support.

stood by the principle that all immigrants, especially the most vulnerable among us, including asylum seekers, deserve an immigration system that is fair and humane.

As Pope Francis has said, “I ask leaders and legislators and the entire international community to confront the reality of those who have been displaced by force, with effective projects and new approaches in order to protect their dignity, to improve the quality of their life and to face the challenges that are emerging from modern forms of persecution, oppression and slavery.”²

CLINIC likewise believes that the most vulnerable among us need greater protections and opportunities, including the ability to work to support themselves and their families. In this vein, CLINIC submits the following comments in opposition to the proposed changes.

I. General Comments

The Department of Homeland Security’s Proposed Rule, if published in its current form, would significantly burden asylum seekers in their effort to obtain an Employment Authorization Document (EAD).³ CLINIC strongly opposes this change and urges DHS to withdraw this portion of the proposed regulation. Adding harsher, more stringent eligibility requirements to the EAD application will unduly burden the lives of asylum seekers eager to be self-sufficient and integrate into our American economy. If this rule is published in its current form, asylum seekers will be unable to sustain themselves as they await adjudication of their asylum claim.

By depriving asylum seekers of the ability to support themselves and their families, the government’s proposed regulations would cause lasting harm to vulnerable people fleeing persecution and seeking refuge in the United States. In the words of Pope Francis:

It is not just about migrants: it is a question of seeing that no one is excluded. Today’s world is increasingly becoming more elitist and cruel towards the excluded. . . Wars only affect some regions of the world, yet weapons of war are produced and sold in other regions which are then unwilling to take in the refugees produced by these conflicts. Those who pay the price are always the little ones, the poor, the most vulnerable, who are prevented from sitting at the table and are left with the “crumbs” of the banquet.⁴

These proposed changes are part of an overall effort to deny asylum seekers the right to international protection and the ability to live their lives in decency with dignity and humanity.⁵

² Pope Francis, *Address to Participants in the Plenary of the Pontifical Council for the Pastoral Care of Migrants and Itinerant People*, (May 24, 2013), http://w2.vatican.va/content/francesco/en/speeches/2013/may/documents/papa-francesco_20130524_migranti-itineranti.html.

³ DHS Docket No. USCIS – 20190011, RIN 1615–AC27, Asylum Application, Interview, and Employment Authorization for Applicants, www.govinfo.gov/content/pkg/FR-2019-11-14/pdf/2019-24293.pdf. The Notice of Proposed Rulemaking is hereinafter referred in the text of these comments as “NPRM” and citations are based on the Federal Register page.

⁴ Pope Francis, *Pope’s message for 2019 World Day of Migrants and Refugees: Full text*, (May 27, 2019), www.vaticannews.va/en/pope/news/2019-05/pope-francis-message-world-day-migrants-refugees-full-text.html.

⁵ In the past two years, asylum seekers have faced unprecedented restrictions on their ability to exercise their right to seek safety in the United States. The government has sought to impose an Asylum Ban (barring those who enter the U.S. without inspection from eligibility to seek asylum) EOIR Docket No. 18-0501, A.G. Order No. 4327-2018, RIN 1125-AA89, 1615-AC34, Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations,

II. Background

The United States has a moral imperative to accept asylum seekers as well as obligations under domestic and international laws. As a signatory to the 1967 Protocol of the 1951 Convention Relating to the Status of Refugees, the United States has an obligation to accept asylum seekers who seek protection. Further, domestic asylum laws have changed throughout the decades. Originally drafted in 1980, the Refugee Act establishes the core principles of asylum adjudications in line with U.S. treaty obligations.

Asylum seekers are able to apply for and obtain an EAD pursuant to 8 C.F.R. 274a.12(c)(8). Until 1994, asylum seekers could file an application for asylum and work authorization concurrently.⁶ In 1994, the regulations were amended to state that “an asylum applicant [would] not be eligible to apply for employment authorization based on his or her asylum application until 150 days after the date on which the asylum application [was] filed.”⁷ This new language created the EAD asylum clock.⁸ Upon filing a complete application for asylum, the clock would begin to run.⁹

In 1996, Congress amended the Immigration and Nationality Act (INA) incorporating language similar to the regulations into the statute.¹⁰ Under the INA as amended, DHS may not issue an EAD to an asylum seeker whose application is pending until 180 days have passed from the date the asylum application is filed.¹¹ Current regulations require asylum seekers to wait 150 days from the time their I-589 (Application for Asylum and Withholding of Removal) is received by USCIS before they can file an initial request for employment authorization.¹² USCIS officers generally approve an EAD application if a corresponding asylum application has been pending for 180 days

Procedures for Protection Claims, www.federalregister.gov/documents/2018/11/09/2018-24594/aliens-subject-to-a-bar-on-entry-under-certain-presidential-proclamations-procedures-for-protection, which is currently enjoined. It has implemented a Third Country Transit Bar, EOIR Docket No. 19-0504, A.G. Order No. 4488-2019, RIN 1125-AA91, 1615-AC44, 84 Fed. Reg. 33829, Asylum Eligibility and Procedural Modifications, www.federalregister.gov/documents/2019/07/16/2019-15246/asylum-eligibility-and-procedural-modifications, preventing those who have transited through a country on the way to the southern border from being eligible for asylum. It has forced vulnerable asylum seekers to wait in dangerous conditions in Mexico while their cases are pending in the United States, “Migrant Protection Protocols” www.ice.gov/factsheets/migrant-protection-protocols-mpp. And it has announced its intentions to charge a fee for asylum applications Presidential Memorandum for the Attorney General and Secretary of Homeland Security on Additional Measures to Enhance Border Security and Restore Integrity to Our Immigration System (April 29, 2019), www.whitehouse.gov/presidential-actions/presidential-memorandum-additional-measures-enhance-border-security-restore-integrity-immigration-system/.

⁶ See, 59 Fed. Reg. 14,780 (Mar. 30, 1994) (“Such applications, submitted on Forms I-765, often accompany asylum applications.”).

⁷ 59 Fed. Reg. 62284, 62,290 (Dec. 5, 1994) (codified as amended 8 CFR § 208.7) The amendments to 8 CFR § 208.7 were first proposed in 59 Fed. Reg. 14,779 (Mar. 30, 1994).

⁸ 59 Fed. Reg. 62,284, 62291. See also Nadine Wettstein et al., American Immigration Council and Penn State’s Center for Immigrants’ Rights, *Up Against the Clock: Fixing the Broken Employment Authorization Asylum Clock*, www.americanimmigrationcouncil.org/sites/default/files/other_litigation_documents/asylum_clock_paper.pdf.

⁹ David A. Martin, *Making Asylum Policy: the 1994 Reforms*, 70 WASH. L. REV. 725, 737-38, 754 (1995).

¹⁰ See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 604, 110 Stat. 3009, 115 (1996) (codified as amended INA § 208).

¹¹ INA § 208 (d)(2).

¹² 8 CFR § 208.7(a)(1).

and the asylum applicant does not have an “aggravated felony” conviction, did not file the asylum application before January 4, 1995, or does not have a recommended approval.¹³

The NPRM proposes to require asylum seekers to wait 365 days to apply for an EAD. Disposing of the EAD asylum clock and instituting a 365 day waiting period, as proposed by the NPRM, would add an undue burden to asylum seekers.¹⁴ DHS also recently published a proposed rule that seeks to eliminate the requirement that EADs be processed within 30 days,¹⁵ so asylum seekers could actually be forced to wait well beyond a year to obtain an initial EAD.

In an historic move, the NPRM would require USCIS officers to deny EAD applications based on potential asylum eligibility criteria such as filing an asylum application after one year of arrival in the United States.¹⁶ Additionally, the NPRM requires that USCIS officers consider crime-based bars such as a particularly serious crime or serious non-political crime; to consider arrests, not just convictions, for certain criminal offenses; and to apply a “totality of circumstances” test in approving an EAD.¹⁷ Finally, and most significantly, the NPRM, if published in its current form, would bar asylum seekers who enter the United States without inspection from any right to legal employment in the United States until their asylum applications are granted. CLINIC’s affiliates, all social and legal service providers who provide free or low-cost legal services to qualifying immigrants will be burdened by this proposed rule. If this rule is published in its present form, immigration representatives will have to further document EAD applications for asylum seekers. This would further drain resources of non-profit agencies that work tirelessly for the immigrant community. Thus, CLINIC opposes all of these proposed changes to the regulations.

The proposed rule provides little justification other than the need to stem the “pull factor,” especially for asylum seekers from the Northern Triangle, without any citation to evidence. Conversely, the Northern Triangle is one of the dangerous regions in the world causing scores of

¹³ 8 C.F.R. § 208.7(a)(1).

¹⁴ 84 Fed. Reg. 62,377 (Nov. 14, 2019).

¹⁵ 84 Fed. Reg. 47,148 (Sep. 9, 2019).

¹⁶ 84 Fed. Reg. 62,377 (Nov. 14, 2019).

¹⁷ Seth Robbins, “3 Crime Factors Driving Northern Triangle Migrants Out,” Insight Crime, (October 30, 1998), <https://www.insightcrime.org/news/analysis/crime-factors-pushing-northern-triangle-migrants-out/>; Sarah Bermeo, Violence drives immigration from Central America, The Brookings Institute, (June 26, 2018), <https://www.brookings.edu/blog/future-development/2018/06/26/violence-drives-immigration-from-central-america/>. (“It is an outdated notion that people from El Salvador, Guatemala, and Honduras are primarily looking for economic opportunity in the United States and, therefore, should wait in line for a visa. For people fleeing these countries, waiting for a visa can result in death, rape, or forcible recruitment into crime.”).

men, women, and children to seek safety at our shores.¹⁸ Refusing them the ability to legally work as they await their asylum decision is cruel and un-American.

Moreover, while the proposed rule lays out an economic and statistical analysis of the qualitative benefits of the rule, the assertion that the U.S. labor market would benefit from this rule is not supported in the proposed rule. The rule states, “While this rule would not implement labor market tests for the (c)(8) program, it would put in place mechanisms to reduce fraud and deter those without bona fide claims for asylum from filing applications for asylum primarily to obtain employment authorization or other, non-asylum-based forms of relief from removal. DHS believes these mechanisms will protect U.S. workers.”¹⁹ There is no indication in the rule that USCIS consulted with the Department of Labor on whether U.S. workers will be further protected if asylum seekers are out of the work force for up to six months longer, or if they actually would accept employment that an asylum seeker would be willing to take. The assertions in the proposed rule are at best speculative and not determinative.²⁰ Again, there is no indication in the proposed rule that the Department of Labor was consulted on these economic arguments.

III. Employment Authorization for Asylum Applicants

- a. Requiring asylum seekers to wait one year in order to be eligible for employment authorization will add to the suffering of an already-vulnerable population.

Doubling the waiting period for asylum seekers to be granted employment authorization will add undue financial and socio-economic burdens to vulnerable asylum seekers who already must endure poverty and hardship after fleeing persecution.

Asylum seekers come to the United States fleeing persecution and most come to the shores of the United States with nothing more than the clothes on their backs. Upon arrival, asylum seekers face many obstacles. Asylum seekers must wait six full months *after* the asylum application has been filed in order to receive employment authorization and start the road to financial stability; doubling this waiting time will plummet many asylum seekers into poverty.²¹ Moreover, most asylum seekers are prohibited from receiving federal public benefits and most state public benefits.²² Thus with no safety net and no access to employment, asylum seekers who arrive with will have no means of

¹⁹ 84 Fed. Reg. 62,383.

²⁰ 84 Fed. Reg. 62,398 (“The U–6 rate provides additional evidence that U.S. workers *might* be available to substitute into the jobs that asylum applicants currently hold.”) (emphasis added).

²¹ Human Rights Watch, “*At Least Let Them Work*”: *The Denial of Work Authorization and Assistance for Asylum Seekers in the United States*, Human Rights Watch, (2013), www.hrw.org/report/2013/11/12/least-let-them-work/denial-work-authorization-and-assistance-asylum-seekers-united.

²² Karina Fortuny & Ajay Chaudry, Urban Institute, *A Comprehensive Review of Immigrant Access to Health and Human Services* (2011), www.urban.org/sites/default/files/publication/27651/412425-A-Comprehensive-Review-of-Immigrant-Access-to-Health-and-Human-Services.PDF.

supporting themselves for at least a year after reaching “safety” in the United States.²³ Compounding this hardship is another recently-published proposed regulation that would bar an asylum seeker from asylum eligibility if they are convicted of a misdemeanor offense of possessing a false identity document or for fraudulently obtaining public benefits.²⁴ Thus under this proposed rule, an asylum seeker will be stripped of any lawful means of supporting themselves for over a year, and will be permanently barred from asylum solely based on a conviction for a low level misdemeanor.

Asylum seekers generally deplete their life savings to come to the United States after fleeing from persecution, and must seek employment so that they can begin to rebuild their lives as their asylum application is adjudicated. Asylum seekers, particularly those traversing the southern border, come to the United States with few resources, and many incur debts during their journey.²⁵ Consequently, many asylum seekers live in debt bondage or face the prospect of working in industries where they could be prone to exploitation, unsafe work environments, and labor or sex trafficking.²⁶ Requiring asylum seekers to wait an entire year before they can even apply for an EAD, would place them in a precarious situation and make them especially vulnerable to trafficking or accepting unauthorized employment with little or no labor protections.²⁷

- b. Penalizing asylum seekers who fail to meet the one-year filing deadline is unconscionable.

The NPRM proposes to bar EAD eligibility to asylum applicants who have not filed their asylum application within one year of arrival to the United States, unless and until an asylum officer or immigration judge determines that an exception to the one-year filing deadline applies.²⁸ This EAD eligibility bar will harm countless asylum seekers.²⁹ The proposed rule does not offer any justification for penalizing asylum seekers who are unable to apply for asylum within one year of their arrival to the United States. In fact, both the regulations and the statute contemplate exceptions to the one-year filing deadline and many asylum seekers meet the criteria for these exceptions.

²³ Lindsay M. Harris & Joan Hodges-Wu, *Asylum Seekers Leave Everything Behind. There's No Way They Can Pay Trump's Fee.*, WASH. POST, May 1, 2019, www.washingtonpost.com/outlook/2019/05/01/asylum-seekers-leave-everything-behind-theres-no-way-they-can-pay-trumps-fee/?noredirect=on&utm_term=.f4103a5f7230; “We Can’t Help You Here”: U.S. Returns Asylum Seekers to Mexico, Human Rights Watch (2019), www.hrw.org/report/2019/07/02/we-cant-help-you-here/us-returns-asylum-seekers-mexico.

²⁴ 84 Fed. Reg. 69,640. (Dec. 1, 2019).

²⁵ Harris & Hodges-Wu, *supra* note 20; Suzanne Gamboa, “Heartless’: Advocates bristle at Trump plan to charge asylum-seekers a fee,” NBCNews.com (Apr. 30, 2019), www.nbcnews.com/news/latino/heartless-advocates-bristle-trump-plan-charge-asylum-seekers-fee-n1000341.

²⁶ See, e.g., Int’l Labour Org. & Walk Free Found., *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* 52–53 (2017), www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf (“[I]n countries of destination . . . the identification and protection of those deemed most at risk of modern slavery should considered part of the response to influxes of asylum seekers.”).

²⁷ See Max Fisher and Amanda Taub, *Trump Deportation Order Risk: Immigrants Driven Underground*, THE NEW YORK TIMES, Feb. 23, 2017, www.nytimes.com/2017/02/23/world/trump-migrants-deportation.html.

²⁸ 84 Fed. Reg. 62,377 (Nov. 14, 2019).

²⁹ Human Rights First, *The Asylum Filing Deadline: Denying Protection to the Persecuted and Undermining Governmental Efficiency* (2010), www.humanrightsfirst.org/wp-content/uploads/pdf/afd.pdf.

For those seeking asylum within the United States, in addition to meeting the “refugee” definition, the applicant must demonstrate “by clear and convincing evidence that the application has been filed within 1 year after the date of the alien’s arrival in the United States.”³⁰ Congress added this filing deadline to the asylum statute in 1996 to deter individuals who did not have *bona fide* claims from filing simply to seek employment authorization or to delay removal.³¹ Of course, there are many reasons that asylum applicants are unable to file for asylum immediately upon arrival in the United States. In fact, much has been written about the one year filing deadline³² and how it undermines the ability of asylum applicants to obtain protection in the United States.

The INA does contain some limited exceptions to the one-year filing deadline. Section 208(a)(2)(D) of the INA specifies that, notwithstanding the filing deadline, applicants may be eligible for asylum if they can show “either the existence of changed circumstances that materially affect the applicant’s eligibility for asylum or extraordinary circumstances relating to the delay in filing the application within the [one-year filing] period.” The regulations also contain a longer list of examples that could satisfy these exceptions.³³

The one-year filing deadline exceptions apply to many asylum seekers. For example, some asylum seekers whose circumstances have changed such that they now have a asylum claim would be able overcome the one-year filing deadline. Some examples are people who have converted religious³⁴ or political affiliations.³⁵ Likewise, asylum seekers who have come to terms with their LGBTI status and would be persecuted based on such status can also show a changed circumstances exception.³⁶ Some asylum applicants come from countries where safety and political conditions have seriously worsened such that they would later have a asylum claim.³⁷ Asylum seekers with

³⁰ INA § 208(a)(2)(B).

³¹ See Lindsay M. Harris, *The One-Year Bar to Asylum in the Age of the Immigration Court Backlog*, 2016 WIS. L. REV. 1185, 1193 (2016) (“Despite the fact that most genuine refugees were not able to apply within one year of their arrival, members of the 104th Congress were intent on imposing a deadline, apparently under the belief that such a bar was necessary to prevent time-consuming adjudication of fraudulent applications.”); Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved but Still Unfair*, 16 GEO. IMMIGR. L.J. 1, 9 (2001).

³² See, e.g. Philip G. Schrag et al., *Rejecting Refugees: Homeland Security’s Administration of the One-Year Bar to Asylum*, 52 WM. & MARY L. REV. 651 (2010).

³³ 8 CFR § 208.4(a)(2).

³⁴ USCIS, Asylum Officer Basic Training Course: One-Year Filing Deadline (May 6, 2013), at 10. www.uscis.gov/sites/default/files/files/natedocuments/One_Year_Filing_Deadline_Asylum_Lesson_Plan.pdf.

³⁵ *Weinong Lin v. Holder*, 763 F.3d 244,247 (2d Cir. 2014) (finding the respondent’s recent political activism in the United States to be a potential changed circumstance).

³⁶ See *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005); USCIS, Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims Training Module (Dec. 28, 2011), (“As noted above, transitioning from the gender assigned at birth to the gender with which the applicant identifies is a process which may involve many steps. At some point during this process, the applicant may realize that he or she could no longer ‘pass’ as his or her birth gender and therefore may become more fearful of returning to his or her country of origin. For example, a transgender woman (MTF) may have recently had breast implants which would now make it impossible to ‘pass’ as male.”).

³⁷ 8 CFR § 208.4(a)(4)(i)(A); *Vahora v. Holder*, 641 F.3d 1038, 1044 (9th Cir. 2011) (“Our law does not require that “changed circumstances” constitute an entirely new conflict in an asylum applicant’s country of origin, nor does it preclude an individual who has always feared persecution from seeking asylum because the risk of that persecution increases. . . . An applicant is not required to file for asylum when his claim appears to him to be weak; rather he

such claims should not be prevented from obtaining an EAD because they did not file their asylum application within one year of entry, as they would most likely qualify for an exception to the one-year filing deadline.

Similarly, many asylum seekers are eligible for the “extraordinary circumstances” exception.³⁸ Many asylum seekers have not been able to file their asylum applications because of mental or psychological illnesses,³⁹ ineffective assistance of counsel,⁴⁰ legal disability (generally applies to minors),⁴¹ and maintaining lawful immigration status.⁴² Many asylum seekers are unable to file their asylum applications timely because of serious psychological diagnosis related to the persecution faced in the home country.⁴³ Facing an insurmountable level of post-traumatic disorders (PTSD), asylum seekers are often unable to revisit their trauma causing an excusable delay in filing their asylum applications.⁴⁴

Asylum seekers who fail to file an asylum application within the one-year filing deadline are often eligible for one of the exceptions mentioned above. Forcing them to wait until an asylum officer or immigration judge decides that they meet an exception to the filing deadline is unfair and would cause many asylum seekers with genuine claims and clear exceptions to the one-year filing deadline to suffer in poverty without any justification.

Finally, many asylum seekers are completely unaware of the one-year filing deadline. For example, many asylum seekers who pass a credible fear interview, or have been released into the United States after claiming a fear at the border, were never notified of the one-year filing deadline. This clear oversight was found in violation of the INA, Administrative Procedures Act and the Constitution by the U.S. District Court for the Western District of Washington.⁴⁵ The District Court concluded that asylum seekers whose applications are filed beyond the one-year deadline and who are protected under the *Mendez-Rojas* class settlement, must have their applications treated as timely by the immigration judge. However, if this proposed rule were to be published in its current form, many asylum seekers who fall within the class of people protected by this lawsuit would have to wait until an immigration judge deems their application “timely” in order to apply for an EAD. The NPRM does not make any exception for class members of the *Mendez-Rojas* settlement agreement. This is unconscionable and unfair to those who seek asylum in the United States, many of whom have already passed a credible fear screening interview and had every intention of

may wait until circumstances change and the new facts make it substantially more likely that his claim will entitle him to relief.”)

³⁸ 8 CFR § 208.4(a)(5).

³⁹ 8 CFR § 208.4(a)(5)(ii).

⁴⁰ 8 CFR § 208.4(a)(5)(iii).

⁴¹ 8 CFR § 208.4(a)(5)(i).

⁴² 8 CFR § 208.4(a)(5)(iv).

⁴³ USCIS, Asylum Officer Basic Training Course: One-Year Filing Deadline (May 6, 2013), at 13, www.uscis.gov/sites/default/files/files/nativedocuments/One_Year_Filing_Deadline_Asylum_Lesson_Plan.pdf.

⁴⁴ Megan Brooks, “Refugees Have High Burden of Mental Health Problems,” *Psychiatry and Behavioral Health Learning Network*, (June 2019), www.psychcongress.com/article/refugees-have-high-burden-mental-health-problems.

⁴⁵ See *Mendez Rojas v. Johnson*, 2018 WL 1532715 (W.D. Wash. Mar. 29, 2018).

applying for asylum but were prevented from doing so based on a lack of notice of the one-year filing rule by the U.S. government.

- c. Barring legal employment to asylum seekers based on perceived public security risks will leave many with no ability to support themselves and rehabilitate.

The NPRM proposes to bar persons with supposed “public security” risks from eligibility for an EAD.⁴⁶ The NPRM proposes that a USCIS officer adjudicating the EAD application must consider whether the applicant has been convicted of any aggravated felony, any felony, or any non-political crime outside the United States. The officer must further determine whether the EAD applicant has been convicted of certain public safety offences such as driving under the influence (DUI), a domestic violence offense, a controlled substance offense, and/or child abuse or neglect *regardless* of how the violation is classified in state or federal criminal statutes.⁴⁷ Many convictions considered in the NPRM would never be considered a mandatory bar to asylum.⁴⁸

The NPRM in this regard is seriously flawed. First, the NPRM proposes to allow USCIS officers unfettered discretion to deny EAD applications from deserving asylum seekers based on minor exposure to the law. No other EAD category considers these types of arrests and/or convictions if they do not ultimately bar eligibility for the underlying immigration benefit. For example, if a person filing form I-485 seeking to adjust status to lawful permanent resident, has a conviction or even an arrest for a DUI, that applicant would still qualify for an EAD based on a pending I-485 because a DUI would not bar eligibility for adjustment of status.

Second, barring legal employment to asylum seekers for minor criminal conduct and/or an arrest does not make this country safer. The only justification presented in the NPRM to bar EAD eligibility for asylum seekers is to decrease the “pull” factors that attract asylum seekers to the United States. Yet, the NPRM offers no connection between those who come to the United States and supposedly file “frivolous” asylum applications and those with arrests or convictions for minor criminal offenses. There is no added benefit to considering this criminal conduct, especially since the justification for the rule is to stem “pull factors” and any United-States-based criminal conduct would have taken place after the asylum seeker already entered the United States.

Third, this rule, if published in its current form, would add an unnecessary adjudicative burden on already burdened USCIS service center officers. The NPRM seems to contemplate that a USCIS officer at one of the designated service centers will determine if any of these criminal issues would bar eligibility for an EAD and even proposes that officers consider, on a case-by-case basis, foreign arrests and convictions in the EAD application determination. Asylum Officers, who undergo a lengthy training, have long had to consider whether convictions amount to a mandatory bar as a “particularly serious crime,” or if criminal conduct outside the United States amounts to a “serious non-political crime,” but having a USCIS service center officer consider arrests and convictions for relatively minor crimes either inside or outside the United States, will add an undue burden on government workers and further drain government resources to little or no benefit. “Particularly

⁴⁶ 84 Fed. Reg. 62377 (Nov. 14, 2019).

⁴⁷ *Id.*

⁴⁸ *Delgado v. Holder*, 648 F.3d 1095, 1110 (9th Cir. 2011) (en banc) (J. Reinhardt, concurring).

serious crime” and “serious non-political crime” are legal terms of art, which are subject to constant interpretation by the Board of Immigration Appeals and federal circuit courts. It is unreasonable to expect USCIS officers who adjudicate EAD applications to perform the sophisticated legal analysis to determine whether a crime falls within these definitions. Further, it is manifestly unfair to the asylum seeker to have a service center officer make such a determination based solely on the documents submitted in conjunction with an EAD application. Asylum officers and immigration judges are only able to assess whether a conviction falls within one of these legal categories after eliciting detailed testimony from the applicant.

Finally, barring asylum seekers who have had convictions or arrests for substance abuse does not take into account the fact that asylum seekers are an inherently vulnerable population because of the trauma they have experienced in their countries of origin and, often, along the journey to find safety. Nearly thirty percent of asylum seekers struggle with depression, anxiety, or post-traumatic stress disorder (PTSD).⁴⁹ One recent study found the mental health problems facing refugees and asylum seekers so acute that more than a third of the study’s sample admitted having suicidal thoughts in the preceding two weeks.⁵⁰

Asylum seekers in the United States are often unable to access affordable medical care and treatment for trauma related ailments,⁵¹ and some turn to substance use in an effort to self-medicate.⁵² The proposed rule bars EAD eligibility to those who need it the most.⁵³ Given the vulnerabilities of asylum-seeking populations, prior struggles with addiction should be addressed with compassion, not another barrier to the ability to rehabilitate, recover, and regain independence.

- d. Barring asylum seekers from legal employment because they enter the United States between ports of entry is unnecessary and cruel.

The NPRM proposes to exclude asylum seekers from receiving an EAD if “they enter or attempt to enter the United States illegally without good cause.” Again, the proposed rule is requiring that merits of the asylum application be assessed in the adjudication of the EAD application. Many asylum seekers are forced to enter the United States without inspection in order to seek safety, and

⁴⁹ Giulia Turrini et al., *Common Mental Disorders in Asylum Seekers and Refugees: Umbrella Review of Prevalence and Intervention Studies*, INTERNATIONAL JOURNAL OF MENTAL HEALTH SYSTEMS 11:51 (August 2017), www.ncbi.nlm.nih.gov/pmc/articles/PMC5571637/.

⁵⁰ Megan Brooks, *Refugees Have High Burden of Mental Health Problems*, PSYCHIATRY AND BEHAVIORAL HEALTH LEARNING NETWORK, June 2019, www.psychcongress.com/article/refugees-have-high-burden-mental-health-problems.

⁵¹ For more information on immigrant eligibility for federal benefits, see www.nilc.org/issues/health-care/.

⁵² Carrier Clinic, *Trauma and Addiction* (2019), <https://carrierclinic.org/2019/08/06/trauma-and-addiction/> (“...some people struggling to manage the effects of trauma in their lives may turn to drugs and alcohol to self-medicate. ...However, addiction soon becomes yet another problem in the trauma survivor’s life. Before long, the ‘cure’ no longer works and causes far more pain to an already suffering person.”).

⁵³World Health Organization, *Mental Health Promotion and Mental Health Care in Refugees and Migrants: Technical Guidance*, (2018), www.euro.who.int/_data/assets/pdf_file/0004/386563/mental-health-eng.pdf?ua=1. (Higher prevalence of mental disorders in long-term refugees is associated with lack of social integration and specifically with unemployment.)

the INA specifically guarantees that “[a]ny alien who is physically present in the United States or who arrives in the United States,” at a designated port of entry or not, is entitled to apply for asylum.⁵⁴ In writing that law, Congress was specific and clear that immigrants who fear persecution in their home countries are entitled to seek asylum regardless of how they entered the United States.

Using the manner of entry to bar one from eligibility for an EAD is similarly unconscionable as barring them from asylum. In fact, federal courts have already determined that such a ban on asylum to those who enter between ports of entry.⁵⁵ As there is no bar to asylum based on this type of entry (i.e. entry without inspection), there is absolutely no justification for barring EAD eligibility for those who seek safety on our shores, and have no way to do that other than entering the United States between ports of entry.

Requiring USCIS officers to determine whether good cause exists to exempt asylum seekers from this eligibility bar is a waste of resources. Many asylum seekers have no choice but to enter between ports of entry in order to seek safe haven, and asylum seekers who can demonstrate the need to violate an immigration law to seek safety are generally not denied asylum in balancing the equities to exercise favorable discretion.⁵⁶ Moreover, policy changes within the last year have forced thousands of asylum seekers to remain in extremely dangerous cities in Mexico while waiting for hearings in the United States; asylum seekers should not be penalized for irregular entry when the alternative is to wait in cities where they may suffer kidnapping, rape, or murder.⁵⁷

Because this is a relatively settled principle, that most asylum seekers who have entered the United States between ports of entry in order to seek safety would most likely meet the proposed “good cause” standard, this EAD eligibility bar would cause an undue burden on USCIS officers and waste of government resources. Barring asylum seekers from legal employment simply because they had no choice but to enter the United States between ports of entry is cruel and against the morals of this country. Furthermore, CLINIC has significant concerns about the ability of a USCIS service center officer to determine what constitutes “good cause” for violating an immigration law in entering the United States. The officer adjudicating the EAD would not have the opportunity to elicit testimony. DHS should not turn EAD applications into mini-asylum eligibility determinations.

⁵⁴ INA §208(a)(1).

⁵⁵ *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 857 (N.D. Cal. 2018) (“Considering the text and structure of the [asylum] statute, as well as the interpretive guide of the U.N. Protocol, reveals Congress’s unambiguous intent. The failure to comply with entry requirements such as arriving at a designated port of entry should bear little, if any, *weight in the asylum process*. The Rule reaches the opposite result by adopting a categorical bar based solely on the failure to comply with entry requirements.”) (emphasis added).

⁵⁶ *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987); *Gulla v. Gonzales*, 498 F.3d 911, 917–19 (9th Cir. 2007); *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1138 (9th Cir. 2004).

⁵⁷ Human Rights First, *Orders from Above: Massive Human Rights Abuses Under Trump Administration Return to Mexico Policy*, Oct. 2019, www.humanrightsfirst.org/sites/default/files/hrfordersfromabove.pdf.

- e. DHS should not require evidentiary submissions 14 days before asylum interviews.

CLINIC is also concerned about the proposed change to require additional evidentiary submissions 14 days before the asylum interview, or risk stopping the EAD clock. Asylum applicants generally receive their interview notice three to six weeks prior to the interview date. For those who have been in the asylum backlog for many years, it is unreasonable to expect that asylum seekers, or their counsel, will be able to provide updated country conditions information or other evidence, at times within as little as one week. For cases languishing in the backlog, asylum seekers and their counsel currently have no way of knowing whether the interview will be scheduled next month, next year, or, possibly, in the distant future. It is impossible for asylum seekers and their counsel to be constantly updating evidentiary materials to have them readily available in the event that an interview is scheduled with almost no notice.

IV. CONCLUSION

For all of the reasons discussed above, CLINIC urges that the rule change requiring more stringent standards be set for EAD eligibility for vulnerable asylum seekers be withdrawn. CLINIC urges DHS to continue to process EAD asylum applications under (c)(8) category the same way it has been without further eligibility bars proposed in the rule. Allowing USCIS officers unfettered discretion to deny vulnerable asylum applicants the ability to work and support themselves as they rebuild their lives and seek asylum is immoral and goes against the fabric of the 1951 Convention, the 1967 Protocol and the 1980 Refugee Act.

This proposed regulation appears to be a further attempt⁵⁸ by this administration to deter asylum seekers from seeking protection in the United States. President Trump has said, “The biggest loophole drawing illegal aliens to our borders is the use of fraudulent or meritless asylum claims to gain entry into our great country.”⁵⁹ It is immoral to paint the “least ones”⁶⁰ among us as liars without any proof of this claim. All individuals have the right to seek protection from persecution, and the United States has committed itself to protecting this right through its ratification of the Refugee Convention and Protocol, and the Convention Against Torture.⁶¹ While these claims are pending, asylum seekers must be allowed to work and support themselves.

⁵⁸ In the past two years, the government has issued executive orders, precedential decisions by the attorney general, regulations, and informal policy changes explicitly designed to prevent asylum seekers from exercising their rights under U.S. law. *See*, National Immigrant Justice Center, *A Timeline of the Trump Administration's Efforts to End Asylum*, (Aug. 27, 2019), www.immigrantjustice.org/staff/blog/timeline-trump-administrations-efforts-end-asylum.

⁵⁹ White House Fact Sheet, *President Donald J. Trump Is Working to Stop the Abuse of Our Asylum System and Address the Root Causes of the Border Crisis* (Apr. 29, 2019), www.whitehouse.gov/briefings-statements/president-donald-j-trump-working-stop-abuse-asylum-system-address-root-causes-border-crisis/.

⁶⁰ *Matthew* 25:40-45.

⁶¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681 (1998), 1465 U.N.T.S. 85.

Thank you for the opportunity to submit these comments. We appreciate your consideration. Please contact Jill Marie Bussey, CLINIC's Director of Advocacy, at jbussey@cliniclegal.org should you have any questions about our comments or require further information.

Sincerely,

A handwritten signature in blue ink that reads "Anna Marie Gallagher". The signature is written in a cursive style with a large initial "A".

Anna Marie Gallagher
Executive Director